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SYED AHMAD IMDADZ SAID ABAS v. IMEJ MUHIBAH SDN BHD; MAJLIS PEGUAM MALAYSIA (INTERVENER)

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[ORIGINATING MOTION NO: AA-17A-1-08-2019]
B 17 APRIL 2021

LEGAL PROFESSION: *Disciplinary proceedings – Right to be heard – Disciplinary Committee ('DC') found advocate and solicitor guilty of misconduct – DC recommended to Disciplinary Board ('DB') that advocate and solicitor be* C *subjected to s. 103C(1)(c)(iii) of Legal Profession Act 1976 ('LPA') and be suspended from practice for two years – DB affirmed DC's finding on liability but rejected DC's recommended punishment – DB ordered advocate and solicitor to pay fine and, in default, s. 103(1) of LPA shall apply – Whether further order made in event of default of payment of fine – Whether finding of liability of DC, affirmed by DB, ought to* D *be set aside – Whether advocate and solicitor ought to be given reasonable opportunity to be heard before DB makes order likely to be adverse against him*

The respondent had entered into a joint venture agreement ('JVA') with Pintar Asiamas Sdn Bhd ('land owner') to develop a piece of land into a housing scheme. The appellant, an advocate and solicitor, witnessed the E execution of the JVA by the land owner and the power of attorney ('POA') given by the land owner to the respondent. Despite being obliged not to sell the land to any third party during the pendency of the JVA, the land owner entered into a sale and purchase agreement ('SPA') to sell the same piece of land to another company. The SPA was prepared by the appellant's firm and F the execution of the SPA was witnessed by the appellant. This prompted the respondent to lodge a complaint with the Advocates and Solicitors Disciplinary Board ('DB') that the appellant was suspected of having acted in conflict of interest and conspired to defraud the respondent. The complaint was heard before a Disciplinary Committee ('DC'). After going through G documentary evidence and hearing oral evidence given by the manager of the respondent and the appellant, the DC found the appellant guilty of misconduct which amounted to grave impropriety that was, to say, gross disregard of his client's interest and the appellant's conduct was unbefitting of an advocate and solicitor which brought the legal profession into H disrepute. The DC recommended that the appellant be subjected to s. 103C(1)(c)(iii) of the Legal Profession Act 1976 ('LPA') and be suspended from practice for two years. The DB affirmed the DC's finding on liability but rejected the DC's recommended punishment and, instead, ordered the appellant to pay a fine of RM30,000 to the Discipline Fund and, in default, the provisions of s. 103(1) of the LPA shall apply ('order'). Hence, the I present appeal. The issues that arose for determination were: (i) whether the finding of liability of the DC which was affirmed by the DB ought to be set

aside; and (ii) if the finding was not set aside, whether the appellant ought to be given a reasonable opportunity to be heard before the DB made an order that was likely to be adverse against him.

Held (setting aside order and remitted matter back to Advocates and Solicitors Disciplinary Board):

(1) The DC's conclusion, that the appellant had acted in conflict of interest and attempted to cover up the same, a conduct unbefitting that of an advocate and solicitor, was supported by evidence. Having so held, and with the undisputed fact that the appellant acted in drawing up the SPA to sell the land during the pendency of the JVA, the DC's finding of professional misconduct could not be assailed. The DB affirmed the decision of the DC on the latter's finding of liability against the appellant. The DB gave no reason for doing so but, if it affirmed the decision of the DC on this finding, it need not give any reasons. The court had no reason to interfere with the DB's exercise of its power to affirm the DC's finding of liability as against the appellant. The decision of the DB affirming the finding of the DC on liability as against the appellant was upheld. (paras 2, 24, 25, 29 & 30)

(2) The appellant was not heard by the DB before it made the order without clarifying what further order was to be made. Section 103(1) of the LPA requires a further order to be made in the event of default of the payment of the fine and what the order is to be but this was not set out in the order. This uncertainty itself ought to have accorded the appellant a reasonable opportunity to be heard on the prospective further penalty or punishment which would include the possibility of a suspension of up to five years in the event the advocate and solicitor is unable to pay the fine. (paras 33, 34 & 37)

(3) With the amendment to s. 103D(2) of the LPA, the DB may, in appropriate cases, impose a greater or lesser penalty or punishment than that recommended by the DC. With the DB not affirming the recommendation of the DC in terms of punishment and, with s. 103D(4) of the LPA being subjected to sub-s. (2), the net effect was that, although the DB may impose a greater or lesser punishment than that recommended by the DC, before the DB makes an order that is likely to be adverse against an advocate and solicitor, it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard. (paras 42 & 43)

(4) Whilst it may be argued that the appellant was given the right to be heard before the DC, it was undisputable that the DC does not mete out any punishment if it finds the advocate and solicitor liable. Instead, it remits its findings to the DB with its findings on liability together with its recommendations on punishment. The advocate and solicitor would

A not know a punishment is to be meted against him until he is notified by the DB. The advocate and solicitor ought to be given an opportunity to be heard or to mitigate before any punishment is meted out once the DB accepts the finding of liability by the DC. (para 57)

B **(5)** If Parliament meant for the right to be heard to be only available if the DB were to impose a punishment greater than that recommended by the DC, it could have easily said so in s. 103D(4) of the LPA when it introduced the words 'or lesser' by way of amendment to sub-s. 103D(2) of the LPA. Parliament did not. When the entire sub-s. 103D(4) is read in its entirety, the words do not read an order that is 'adverse' but an C order that is 'likely to be adverse'. 'Likely' is defined as (i) 'probably, expected' and a word protean in character in that its meaning might vary with the context (*Longman Dictionary of Law* (7th edn)); and (ii) 'probable, such as well might happen or be true' and 'to be reasonably expected including plausible' (*Oxford Dictionary and* D *Thesaurus*). (para 57)

(6) The order was set aside with the matter remitted back to the DB for the DB to give the appellant a reasonable opportunity to be heard before it makes an order that is likely to be adverse against the appellant. (para 59)

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Case(s) referred to:

Browne v. Dunne [1893] 6 R 67 ***(refd)***

Darshan Singh Khaira v. Zulkefli Hashim [2020] 1 LNS 260 CA ***(refd)***

Darshan Singh Khaira v. Zulkefli Hashim; Majlis Peguam Malaysia (Intervener) [2018] 1 LNS 1934 HC ***(refd)***

F *Dato' Amelda Md Din v. Majlis Peguam Malaysia [2018] 6 CLJ 602 HC* ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Islamic Renaissance Front Bhd v. The Minister Of Home Affairs [2020] 5 MLJ 399 ***(refd)***

Jaswinder Kaur Gurbachan Singh v. Mokhtar Singh Lal Singh; Majlis Peguam Malaysia G *(Intervener) [2017] 1 LNS 591 HC* ***(refd)***

Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham [2019] 5 CLJ 139 FC ***(refd)***

Mohamad Jamaludin Mohamad Amin v. Zalina Isa [2010] 5 CLJ 695 HC ***(refd)***

Ong Keh Keong v. Lembaga Tatatertib Peguam-peguam [2020] 10 CLJ 181 CA ***(refd)***

PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***

Sithradevi Nagalingam v. Masdar Darman & Anor; Majlis Peguam Malaysia (Intervener) H *[2021] 3 CLJ 677 FC* ***(refd)***

Wan Ahmad Wan Daud lwn. Wan Jawahir Hj Harun & Satu Lagi Rayuan [2016] 4 CLJ 572 CA ***(not foll)***

Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

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Legislation referred to:
Federal Constitution, art. 132(3)(c)
Legal Profession Act 1976, ss. 94(2), 103(1)(c)(iii), 103C(1), 103D(1), (2), (3), (4), 103E(5)
Rules of Court 2012, O. 59 r. 6(2)

For the appellant - Ahmad Yani Aminuddin, Mior Muhammad Fadhli Mior Shaifuddin & Nurul Jannah Mohd Joaini; M/s Nurul Fadhli & Partners
For the respondent - Ranjan N Chandran; M/s Hakem Arabi & Assocs
For the intervener - Robin Lim Fang Say; M/s Chan & Assocs

Reported by Najib Tamby

JUDGMENT

Su Tiang Joo JC:

Q: Should an advocate and solicitor be given a reasonable opportunity to be heard before the Advocates And Solicitors Disciplinary Board ("DB") makes an order that is likely to be adverse against him if the DB intends to impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee ("DC")?

Introduction

[1] On 3 March 2021, this court answered the above in the affirmative and remitted the matter to the DB for the advocate and solicitor to be given a reasonable opportunity to be heard before the DB makes an order that is likely to be adverse against him. Dissatisfied, the Bar Council Malaysia by notice of appeal dated 1 April 2021 appeals to the Court of Appeal.

[2] In making the order of 3 March 2021, this court had upheld the decision of the DB affirming the finding of the DC on liability against the advocate and solicitor. Dissatisfied, the advocate and solicitor by notice of appeal dated 2 April 2021 appeals to the Court of Appeal.

Background

[3] The appellant, Syed Ahmad Imdadz B Said Abas, is an advocate and solicitor, practising as a sole proprietor in the law firm of Messrs Syed Anuar & Associates in Ipoh, Perak.

[4] By letter dated 4 October 2016, the respondent had complained to the DB that the appellant is suspected of having acted in conflict of interest and having conspired to defraud it.

[5] In summary, the respondent complained that as a developer, it had entered into a joint venture agreement dated 1 August 2012 ("JVA") with Pintar Asiamas Sdn Bhd ("landowner") who was to be alienated a piece of State land measuring approximately 11 acres by the State Authority of Perak, to develop the land into a housing scheme to comprise 116 terrace housing

A lots. The appellant witnessed the execution of the JVA by the landowner as well as the power of attorney ("PA") given by the landowner to the respondent and which was also dated 1 August 2012.

[6] It subsequently came to the knowledge of the respondent that during the pendency of the JVA, the landowner who was obliged not to sell the land B to any third party, had entered into a sale and purchase agreement dated 9 October 2013 ("SPA") to sell the same piece of land comprising 116 lots of vacant land to Ken Han Sdn Bhd. This sale and purchase agreement was prepared by Messrs Syed Anuar & Associates and the appellant had witnessed the execution of this agreement by both the landowner and Ken C Han Sdn Bhd.

[7] The appellant denied it acted for any party to the JVA. He asserted that he was not privy to the terms and conditions of the JVA and his role was merely to witness and attest the execution of the JVA and the PA by the landowner. And, given this limited role, there is no misconduct on his part. D

[8] In reply, the respondent asserted that in any event, in drawing up the SPA, the appellant would have become appraised of the terms of the JVA and would be aware that both the JVA and the SPA were to do with the same land.

E **Disciplinary Committee ("DC")**

[9] The complaint by the respondent was duly heard by way of a formal inquiry before a DC on 21 February 2018. The hearing was concluded on 19 March 2018. From the DC's report (encl. 15, pp. 81 to 138), the following findings of liability (encl. 15, pp. 134 to 137) and recommendations for F punishment (encl. 15, p. 138) were made against the appellant.

Liability

[10] Premised upon *inter alia* the documentary evidence in the form of a bill (encl. 15, p. 98) found by the DC to be that of the appellant's for G preparing the JVA and the PA and, three covering letters (encl. 15 pp. 99 to 104) on payment of compensation to squatters on the land and copied to the appellant together with the JVA and PA, the DC found that the appellant had acted for both parties to the JVA including the respondent and had collected the fees for the same.

H **[11]** The manager of the respondent gave evidence. He testified that the respondent paid for the above-mentioned bill and the compensation meant for the squatters and that the bill and the three covering letters for payment were prepared by the appellant copied to himself.

I **[12]** During the cross-examination of the manager, it was never put to him that the bill (encl. 15, p. 98) carrying the letterhead of the law firm of the appellant, Messrs Syed Anuar & Associates, levying fees for the preparation of the JVA and PA as well as seeking stamping fees for the JVA and the PA

was forged. And, it was also not put to the manager that the appellant did not prepare the three covering letters which carry the statement that the letters were copied to the appellant.

[13] The appellant was represented by his counsel during the hearing before the DC. With the appellant having "declined to avail himself of the opportunity to set out his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all". See the oft-quoted decision in *Browne v. Dunne* [1893] 6 R 67 a decision of the English House of Lords and cited with approval by many of our courts in Malaysia.

[14] The DC went on to find that:

> having played a major role in the preparation of the JVA, any action on the part of the appellant in the disposal of the land involved significant risk of conflict of interest and any attempt to cover up the conflict turns it into a misconduct on the part of the solicitor. Sacrificing the interest of one client for self-benefit or for the benefit of others is a conduct unbefitting of an advocate and solicitor
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> (encl. 15 p. 137 para 24).

[15] The DC found that it is "more than convinced" that the appellant "owed a duty of care" to the respondent (encl. 15 p. 137 para 23) and in rather cryptic terms said it is left with "a lingering doubt to the honesty" of the appellant (encl. 15 p. 136 para 22).

[16] Although the following further findings were placed under its recommendations, I am of the view that it would be more appropriate to set them out here under findings on liability by the DC namely that the appellant is guilty of misconduct which amounts to grave impropriety that is to say, gross disregard of his client's interest and the appellant's conduct is unbefitting of an advocate and solicitor which brings the legal profession into disrepute (encl. 15, p. 138, para. B).

Recommendation (On Punishment)

[17] The DC recommended that the appellant be subject to s. 103C(1)(c)(iii) of the Legal Profession Act 1976 ("LPA") and be suspended from practice for two years (encl. 15, p. 138, para. B).

[18] For ease of reference, the provisions of s. 103C(1)(c)(iii) is reproduced hereunder:

> 103C. (1) *Upon conclusion of the inquiry, a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine and make any one of the following recommendations to the Disciplinary Board*:

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(c) *that cause for disciplinary action exists and is of sufficient gravity to warrant the advocate and solicitor to be subject to one or more of the following penalties or punishments*:

(i) reprimand or censure;

(ii) imposition of a fine not exceeding fifty thousand ringgit;

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(iii) *suspension of the advocate and solicitor from practice, or in the case of a foreign lawyer, recommendation to the Bar Council for suspension of registration, for such period not exceeding five years as the Disciplinary Committee deems appropriate in the circumstances*; or

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(iv) striking the advocate and solicitor off the Roll or in the case of a foreign lawyer, recommendation to the Bar Council for revocation of the registration of the foreign lawyer.

(emphasis added)

Disciplinary Board

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[19] In the exercise of its powers under s. 103D of the LPA, the DB on 21 June 2019 affirmed the DC's finding on liability but rejected the DC's recommendation on punishment and ordered the appellant to pay a fine of RM30,000 to the discipline fund and in default, the provisions of s. 103(1) shall apply (encl. 15, p. 140).

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[20] The provisions of s. 103D and 103(1) of the LPA are set out hereunder:

103D After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection.

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103 (1) Where the Disciplinary Board has ordered a fine to be paid by an advocate and solicitor or has ordered a restitution to be made by an advocate and solicitor, such fine shall be paid or such restitution shall be made within one month from the date of the order or such further date as the Disciplinary Board may allow, **and in default thereof** the Disciplinary Board **may order** suspension of the advocate and solicitor from practice until the payment of such fine or sum to be restituted or if the advocate and solicitor is currently not in possession of a practicing certificate, order that no Sijil Annual shall be issued to him until payment of the fine or sum to be restituted is made or in the case of a foreign lawyer, recommend to the Bar Council to suspend his registration until the payment of such fine or sum to be restituted is made.

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(emphasis added)

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[21] Section 103(1) of the LPA requires a further order to be made in the event of default of the payment of the fine and what the further order is to be but this was not set out in the DB's order of 21 June 2019. This

uncertainty by itself ought to have accorded the appellant a reasonable opportunity to be heard on the prospective further penalty or punishment which would include the possibility of a suspension of up to five years.

Issues For Determination

[22] The issues that calls for the determination of this court in hearing this appeal are two namely:

(i) whether the finding of liability of the DC which was affirmed by the DB ought to be set aside; and

(ii) if the finding of liability is not set aside, whether the appellant be given a reasonable opportunity to be heard before the DB makes an order that is likely to be adverse against him.

Whether The Finding Of Liability Ought To Be Set Aside

[23] The appellant asserted that both the JVA and the PA were not prepared by him. He merely attested or witnessed the execution of the same by the landowner and he was not instructed, appointed and or acted on behalf of the respondent. And, he acted only for the purchaser. In the circumstances, there was no solicitor-client relationship between him and the respondent and he owes no duty to the plaintiff. In *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719; [2015] 1 MLJ 773, the Federal Court in holding that there was a solicitor-client as well as a fiduciary relationship between the first appellant and the respondents and that the first appellant should not have made a profit out of this trust held that:

> [35] It is trite law that in an action against a solicitor by his or her erstwhile client the threshold issue is whether a solicitor-client relationship exists between the plaintiff-client and the defendant-solicitor. In the absence of such relationship the defendant-solicitor in his professional capacity owes no duty to the plaintiff-client.
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> Solicitor-Client Relationship
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> [36] A solicitor-client relationship may arise either:
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> (a) by an express agreement between a solicitor and a client; or
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> (b) where there is express assertion by a solicitor to act for the client; or
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> (c) it may be implied.
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> [37] Where it is to be implied it is for the purported client in an action against a solicitor to prove the existence of a solicitor-client relationship between them. Proof of such relationship requires an objective consideration of all the facts and circumstances in order to come to a reasonable conclusion:

A (a) that the purported client has sought for advice or assistance from the solicitor;

(b) that the assistance sought for was within the professional competence of the solicitor;

B (c) that the solicitor expressly or impliedly agreed to provide such assistance or reasonably should know that the purported client would reasonably rely on him to provide the assistance; and

(d) that it was reasonable for the purported client to believe that the solicitor was representing him.

C [38] It is therefore a matter of evidence to determine whether a solicitor-client relationship exists. Hence, it is essential to consider such evidence adduced including the words and conduct of the parties towards each other. It is also to be noted that fee arrangement or payment is not determinative of the existence of a solicitor-client relationship.

D **[24]** The DC had heard oral evidence given by the manager of the respondent and that of the appellant and had gone through the documentary evidence and came to a finding that the bill (encl. 15, p. 98) was put up by the appellant for preparing the JVA and the PA and that there were contemporaneous documents in the form of three letters (encl. 15, pp. 99 to 104) on payment of compensation to squatters on the land and copied to E the appellant which show the latter's involvement beyond that of mere attestation or witnessing of the JVA and the PA. These findings are supported by evidence and support the DC's conclusion that the appellant had acted in conflict of interest and the attempt to cover up the same is conduct unbefitting that of an advocate and solicitor.

F **[25]** Having so held and with the undisputed fact that the appellant acted in drawing up the sale and purchase agreement to sell the 116 lots of land during the pendency of the JVA, the DC's finding of professional misconduct cannot be assailed.

G **[26]** David Wong Dak Wah CJSS speaking for the Federal Court in *Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham* [2019] 5 CLJ 139 said that:

[37] Another point which we must mention is that the LPA places the primary burden on the disciplinary tribunal in the form of the disciplinary committee and the Bar Council to oversee the conduct of advocates and solicitors. It is a matter of peers judging peers premised on standard of H conduct determined by themselves. The court's role is one of review in a form of hearing appeals from any aggrieved party by the order of the DB.

[27] The Court of Appeal in *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878 held that:

I It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable

profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour.

[28] It would be interesting to note that the Court of Appeal in *Gana Muthusamy* (*supra*) expressed doubt whether it has the jurisdiction to entertain an appeal as an appeal from the High Court lay directly to the Supreme Court pursuant to s. 103E of the LPA but this provision has since been amended by Act A1444 which came into force on 3 June 2014 with the introduction of s. 103E(5) of the LPA providing that any appeal against the decision of the High Court shall be to the Court of Appeal and thereafter to the Federal Court.

[29] The DB affirmed the decision of the DC on the latter's finding of liability against the appellant. The DB gave no reason for doing so but if it affirms the decision of the DC on this finding, it need not give any reason. See *Dato' Amelda Md Din v. Majlis Peguam Malaysia* [2018] 6 CLJ 602; [2018] 8 MLJ 432 (HC) where the decision of the DB was set aside for failing to provide a reason for rejecting the recommendation of the DC as is statutorily required by s. 103D(1) of the LPA.

[30] In the circumstances, premised upon the evidence that obtains, this court has no reason to interfere with the DB's exercise of its power to affirm the DC's finding of liability as against the appellant pursuant to s. 103D(1) of the LPA.

Whether The Appellant Be Given A Reasonable Opportunity To Be Heard Before The DB Makes An Order That Is Likely To Be Adverse Against Him

[31] Section 103D of the LPA which was introduced by the Legal Profession (Amendment) Act 2012 and which came into force on 3 June 2014 is reproduced below:

103D Consideration by the Disciplinary Board of the report of the Disciplinary Committee

(1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection.

(2) The Disciplinary Board may in appropriate cases impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee.

(3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

A (4) Before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under subsection (2) or (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

[32] Before proceeding further, it would be helpful to set out the provisions B of s. 103D of the LPA that were applicable prior to 3 June 2014 so that the difference that obtains before 3 June 2014, in particular, that of s. 103D(2) of the LPA can be clearly seen here:

Provisions of section 103D that were applicable prior to 3 June 2014:

C 103D. (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order:

(a) Affirming the recommendation of the Disciplinary Committee; and

(b) May either accept the recommendations of the Disciplinary Committee of the punishment to be imposed or, in exceptional D cases, impose a greater punishment.

(2) Before the Disciplinary Board makes an order and imposes a punishment under this section which results in **greater punishment** it shall notify the advocate and solicitor concerned of its intention to do so and give him reasonable opportunity to be heard.

E (3) Where the Disciplinary Board does not agree with the recommendations of the Disciplinary Committee, the Disciplinary Board shall make such order as it deems just.

(emphasis added)

[33] It is undisputed that the appellant was not heard by the DB before it F made the order of 21 June 2019 wherein it had rejected the recommendation of the DC to have the appellant suspended from practice for two years and instead ordered the appellant to pay a fine of RM30,000 and in default the provisions of s. 103(1) shall apply but without clarifying what further order was to be made as is required under s. 103(1) in the event of such a default G (encl. 15, p. 140).

[34] The Bar Council Malaysia contends that the need by the DB to give the appellant a reasonable opportunity to be heard before it made the order meting out a punishment against the appellant is only required where the DB enhances the penalty or punishment recommended by the DC. The appellant H contends otherwise.

[35] In support of its contention, the Bar Council Malaysia pointed out that the DC had recommended a punishment of suspension of two years but the DB did not affirm it but instead imposed a fine of RM30,000 and asserted that this is a lesser punishment or penalty. The issue of the default penalty I or punishment was not canvassed in its submissions.

[36] The DB gave as its reason for its rejection of the DC's recommended punishment, that the two years suspension was too harsh and that a fine of RM30,000 would be appropriate in the circumstance (see Annexure A annexed to the letter issued by the DB of 19 November 2019 in encl. 15, exh. SAI-3, p. 2).

[37] Section 103(1) of the LPA (*supra*) requires a further order to be made in the event of default of the payment of the fine and what the further order is to be but this was not set out in the DB's order of 21 June 2019. This uncertainty by itself ought to have accorded the appellant a reasonable opportunity to be heard on the prospective further penalty or punishment which would include the possibility of a suspension of up to five years in the event the advocate and solicitor is unable to pay the fine.

[38] In *Jaswinder Kaur Gurbachan Singh v. Mokhtar Singh Lal Singh; Majlis Peguam Malaysia (Intervener)* [2017] 1 LNS 591, the High Court in reference to s. 103D(2), (3) and (4) of the LPA held as follows:

> [16] It must be emphasised that there is no need for the Disciplinary Board to give any notice to the appellant before making the Disciplinary Board order dated 14 April 2016 based upon Section 103D(4) of the LPA 1976 (read together with Section 103D(2) and (3) of the LPA 1976 where:
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> (a) the Disciplinary Board did not make any order which is likely to be adverse against an advocate and solicitor and which **is greater** than that recommended by the Disciplinary Committee; and
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> (b) the Disciplinary Board agrees and thereafter affirms the decision of the Disciplinary Committee's recommendation of striking off the appellant from the Roll of Advocates and Solicitors.
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> (emphasis added)

[39] In *Darshan Singh Khaira v. Zulkefli Hashim; Majlis Peguam Malaysia (Intervener)* [2018] 1 LNS 1934, the High Court held:

> [32] Under sub-s. 103D(4), the DB is required to notify the advocate and solicitor of its intention to make an order that is likely to be adverse against him under sub-s. 103D(2) or (3) and give him a reasonable opportunity to be heard. *Subsections 103D(2) & (3) is applicable where the DB does not agree with the findings or the recommendations of the DC and seeks to impose a greater or lesser penalty or punishment than that recommended by the DC*. Therefore, the requirement of giving a reasonable opportunity to be heard to the appellant before the DB makes a decision is when the DB does not agree with the findings and recommendations of the DC.
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> [33] However, in the present case, since the DB had affirmed both the findings and recommendations of the DC, there is no statutory requirement for the DB to give the appellant an opportunity to mitigate on the sentence or to be given a notice that he will be struck off the Rolls.
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> (emphasis added)

[40] The High Court decision of *Darshan Singh Khaira* (*supra*) was affirmed by the Court of Appeal, see *Darshan Singh Khaira v. Zulkefli Hashim* [2020] 1 LNS 260 but no discussion was made on the application of s. 103D of the LPA.

[41] In *Wan Ahmad Wan Daud lwn. Wan Jawahir Hj Harun & Satu Lagi Rayuan* [2016] 4 CLJ 572, the Court of Appeal considered the provisions of s. 103D(4) of the LPA prior to its amendment and it was held that:

> [40] Notis yang dikeluarkan oleh Lembaga Tatatertib kepada responden merupakan notis di bawah s. 103D(2) dan (4) Akta Profesion Undang-Undang. Oleh itu, apa-apa hukuman yang bakal dikenakan hendaklah **hukuman yang lebih berat daripada apa yang disyorkan oleh Jawatankuasa Tatatertib dan bukannya hukuman yang lebih ringan**.
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> [41] Inilah sebabnya kenapa s. 103D(4) Akta Profesion Undang-Undang memberi hak untuk didengar kepada responden. Secara logiknya, jika Lembaga Tatatertib tidak berhasrat untuk mengenakan hukuman yang lebih berat dari apa yang disyorkan oleh Jawatankuasa Tatatertib, tidak timbul soal memberi hak untuk didengar kepada responden. Hanya keputusan yang bakal "adverse" kepada responden sahaja yang memerlukan hak ini diberi.
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> [42] Dalam hubungan ini, perlu diperhatikan bahawa ayat yang digunakan dalam s. 103D(4) ialah "Before the Disciplinary Board makes an order under sub-s. (2) or any order that is likely to be adverse against the advocate and solicitor …" **Subseksyen (2) yang dirujuk dalam s. 103D(4) itu bercakap mengenai hukuman yang lebih berat sahaja dan bukan hukuman yang lebih ringan**. (emphasis added)

[42] With the amendment to s. 103D(2) of the LPA by Act A1444, with effect from 3 June 2014, the DB may in appropriate cases impose a greater or lesser penalty or punishment than that recommended by the DC.

[43] For purposes of the present case, with the DB not affirming the recommendation of the DC in terms of punishment and, with s. 103D(4) of the LPA being subjected to sub-s. (2), the net effect is that, although the DB may impose a greater or lesser punishment than that recommended by the DC, before the DB makes an order that is likely to be adverse against an advocate and solicitor it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

[44] The Bar Council of Malaysia took the position that as the DB meted out a punishment of a fine of RM30,000 which it asserts is a lesser punishment than that recommended by the DC which was a suspension for two years, there was no necessity for the DB to give the appellant a reasonable opportunity to be heard as the order is not likely to be adverse against the appellant.

[45] However, with the addition of the words "or lesser" to s. 103D(2) of the LPA, with all due respect, the decision of the Court of Appeal in *Wan Ahmad Wan Daud lwn. Wan Jawahir Hj Harun & Satu Lagi Rayuan* (*supra*) would no longer be binding on this court. Instead, I am of the opinion that it would be open to this court to relook at s. 103D(4) of the LPA afresh in the light of the amendment to s. 103D(2) of the LPA with particular emphasis on the words "order that is likely to be adverse" to the advocate and solicitor.

[46] The word "adverse" is not defined in the LPA and reference was made by the Bar Council Malaysia to the *Oxford English Dictionary* which defined it to mean:

> 1. Acting in opposition to, actively hostile. 2. Opposing any one's interest: hence unfavourable, injurious, calamitous. Const. ME. 3. Opposite in position 1623.

[47] The Bar Council of Malaysia submitted that the appellant need not be given an opportunity to be heard as the order made by the DB cannot be viewed as adverse since it has acted favourably on behalf of the appellant by reducing the punishment from that recommended by the DC.

[48] In other words, the Bar Council of Malaysia maintains that despite the introduction of the words "or lesser" to sub-s. (2) of s. 103D of the LPA, the position that obtains in s. 103D of the LPA prior to its amendment (*supra*) and that in *Wan Ahmad Wan Daud lwn. Wan Jawahir Hj Harun & Satu Lagi Rayuan* [2016] 4 CLJ 572 is still good, that is, an advocate and solicitor is only entitled to a reasonable opportunity to be heard if the DB metes out a punishment that is greater than that recommended by the DC and not otherwise. It, therefore, pegs the right of the opportunity to be heard to be dependent upon the punishment recommended by the DC and the punishment that the DB intends to make must be one greater than that recommended by the DC.

[49] Sub-section 103C(1) of the LPA read together with sub-s. 94(2) of the LPA provides that the DC could recommend that any advocate and solicitor who has been guilty of any misconduct be punished with one or more of the following penalties or punishments and that any advocate and solicitor can be liable:

(a) to be struck off the Roll or in the case of a foreign lawyer, his registration can be revoked;

(b) to be suspended from practice for any period not exceeding five years, or in the case of a foreign lawyer, his registration as one can be suspended for such period not exceeding five years;

(c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or

(d) to be reprimanded or censured.

[50] This begs the question, is the imposition of a fine a lesser punishment than that of a suspension because if a heavy fine had been ordered by the DB instead of a punishment of a short period of suspension than what is recommended by the DC, it becomes rather unclear as to which is a greater or lesser punishment. When the following example is given, it better illustrates the issue, for eg, the DC recommends a day's or a week's suspension and the DB rejects the same and instead orders a fine of RM50,000.

[51] When posed this question, counsel for the Bar Council Malaysia candidly replied that it is not clear whether as between a suspension and a fine, which is a greater punishment.

[52] This would naturally lead to the next question on what is the test that is to be applied to ascertain whether an order made by the DB is likely to be adverse against an advocate and solicitor under sub-s. 103D(4) of the LPA. Should it be a subjective test viewed from the lens of the DB or that of the advocate and solicitor? Or, should it be an objective test viewed from the lens of a reasonable man, a disinterested person armed with all the facts who would say that in the circumstances the punishment sought to be imposed would be likely to be adverse to the advocate and solicitor.

[53] Of course, if it is to be a subjective test premised upon the view of the DB, it is for the DB to decide and this would mean that the DB has an absolute discretion whether an advocate and solicitor is to be given an opportunity to be heard simply because with the amendment to s. 103D(2), the DB has the right to affirm the recommendation of the DC or mete out a greater or lesser punishment than that recommended by the DC.

[54] Conversely, if it is the advocate and solicitor who is to decide whether the punishment that the DB is imposing upon him is likely to be adverse to him, it is more likely than not that he would wish to be given the opportunity to be heard to mitigate the punishment sought to be imposed upon him. Indeed, any advocate and solicitor worth his salt would wish to take up this opportunity as any mitigation carries the opportunity to have the proposed punishment reduced or maybe done away with altogether.

[55] The Bar Council, however, submitted that only if the penalty or punishment meted out by the DB is greater than that recommended by the DC is the advocate and solicitor to be afforded a reasonable opportunity to be heard.

[56] In my view, as alluded to earlier, with all due respect, with the introduction of the word "or lesser" to sub-s. 103D(2) of the LPA with effect from 3 June 2014, the requirement of the DB to afford an advocate and solicitor an opportunity to be heard is no longer fettered by it wanting to impose a punishment greater than that recommended by the DC as laid down by the Court of Appeal in *Wan Ahmad Wan Daud lwn. Wan Jawahir Hj Harun & Satu Lagi Rayuan* (*supra*).

[57] With respect, there is to my mind no need for either a subjective or an objective test. Instead, at the time I made my decision I was of the view that before the DB intends to impose any punishment it ought to give the advocate and solicitor a reasonable opportunity to be heard. The following are my grounds for the decision I had made namely:

(i) Whilst it may be argued that the appellant was given the right to be heard before the DC, it is indisputable that the DC does not mete out any punishment if it finds the advocate and solicitor liable. Instead, it remits its findings to the DB with its findings on liability together with its recommendations on punishment. And, the advocate and solicitor will not know a punishment is to be meted against him until he is notified by the DB.

(ii) The burden of finding misconduct against an advocate and solicitor is high, it has to be proven beyond reasonable doubt, (see *Sithradevi Nagalingam v. Masdar Darman & Anor; Majlis Peguam Malaysia (Intervener)* [2021] 3 CLJ 677 (FC)) which is a standard required in criminal proceedings.

(iii) In *Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham* [2019] 5 CLJ 139, a complaint against Cecil Abraham, an advocate and solicitor, for professional misconduct was lodged by the Bar Council of Malaysia. Balasubramaniam a/l Perumal ("Bala") who was a prosecution witness in the murder trial of Altantuya Shaaribu had, on 1 July 2008, signed a statutory declaration ("SD") where he had *inter alia* implicated Datuk Seri Najib Tun Razak in a relationship with Altantuya but on 4 July 2008 Bala signed another statutory declaration disavowing the entire contents of his earlier SD alleging it was signed under duress. However, Bala in a three-part video alleged he signed the later SD to retract his earlier SD under duress. The complaint of professional misconduct against Tan Sri Cecil Abraham was to call upon the DB to investigate whether he was the advocate and solicitor who was responsible for or involved in drafting the later SD. It was found that the evidence was not sufficient to make out a case for disciplinary action against Tan Sri Cecil Abraham and the Federal Court held that:

> (2) The standard of proof in disciplinary matters before the BC (*sic*) is one of beyond reasonable doubt **similar to that of a criminal proceeding. The respondent, like an accused in a criminal trial**, was fully entitled to call upon his armoury of defence available in law to protect himself against the allegations made. (emphasis added)

(iv) If an accused facing a criminal charge is found guilty, he is entitled to plead in mitigation and in this regard, save for offences that carry a mandatory punishment like for eg, capital punishment, all accused are allowed to mitigate; see *Zaidon Shariff v. PP* [1996] 4 CLJ 441 where Augustine Paul J held that:

> *A mitigation plea should not be treated as a ritualistic step to be summarily rejected the moment it is made. It is a constituent element of the sentencing process. It merits due consideration in light of the facts of each case*, and more so when it is not contradicted by the prosecution as in this case. (emphasis added)

(v) Wherefore, similar to that of an accused in a criminal trial, the advocate and solicitor ought to be given an opportunity to be heard or to mitigate before any punishment is meted out once the DB accepts the finding of liability by the DC.

(vi) In keeping with criminal law, if there is any ambiguity in the construction of s. 103D(4) of the LPA, any ambiguity must be resolved in favour of the advocate and solicitor and this will mean that the advocate and solicitor must be given a reasonable opportunity to be heard. In *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197 FC at para. [6], the late Augustine Paul FCJ speaking for the Federal Court held that the Court of Appeal was right in saying that a penal statute must be strictly construed and, there is a rule of construction that when there is an ambiguity or doubt in the meaning of a word in a penal statute it must be resolved in favour of the subject.

(vii) Further, with respect, if Parliament meant for such a right to be heard to be only available if the DB were to impose a punishment greater than that recommended by the DC, it could have easily said so in s. 103D(4) when it introduced the words "or lesser" by way of amendment to sub-s. 103D(2) of the LPA which came into effect on 3 June 2014. Parliament did not;

(viii) Indeed, it has been recently been reaffirmed by our Court of Appeal in *Islamic Renaissance Front Bhd v. The Minister Of Home Affairs* [2020] 5 MLJ 399 that no man may be condemned unheard. Although this case was to do with an administrative action by way of judicial review to quash the order made by the respondent to seize three books published by the appellant, this principle is of universal application. Abu Bakar Jais JCA in allowing the appeal and granting the order to quash the respondent's order of seizure, said:

> [45] *Further, the right of hearing is always available and enshrined without requiring it to be stated in any statutory provisions*. The Federal Court was clear on this principle in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152 where Raja Azlan Shah FCJ after referring to several cases unequivocally said:

> *The cases show that a fair hearing is required as a 'rule of universal application', 'founded on the plainest principles of justice'. In particular, the silence of the statute affords no argument for excluding the rule, for the 'justice of the common law will supply the omission of the legislature.'* These quotations are derived from the case of *Cooper v. Wandsworth Board of Works*, which has several times recently been approved by the House of Lords as expressing the principle in its full width: see *Ridge v Baldwin; Wiseman v. Borneman* [1971] AC 297.
>
> *In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing*. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown.
>
> [46] *As indicated there is no dispute that the respondent did not give any right of hearing to the appellant before issuing the orders. This right should have been given following the decision above.*
>
> (emphasis added)

(ix) In *Mohamad Jamaludin Mohamad Amin v. Zalina Isa* [2010] 5 CLJ 695; [2010] MLJU 140 (HC), the DC recommended a fine of RM5,000. The DB disagreed and imposed a punishment of suspension of three years after giving the advocate and solicitor an opportunity to be heard. Although the proceedings were under s. 103D of the LPA prior to the amendment it is pertinent to note that His Lordship Zamani A Rahim JC said that:

> I have no doubt that the said Notice is sufficient compliance with **s. 103D(4) which housed the doctrine of natural justice and procedural fairness.**
>
> (emphasis added)

(x) When the entire sub-s. 103D(4) of the LPA is read in its entirety, the words do not read an order that is "adverse" but an order that is "likely to be adverse".

(xi) The *Longman Dictionary of Law* (7th edn) defines "likely" as "probably, expected" and that it is a word protean in character in that its meaning might vary with the context.

(xii) The *Oxford Dictionary & Thesaurus* defines "likely" to be "1. probable, such as well might happen or be true. 2. to be reasonably expected including plausible".

(xiii) The literal meaning would be that any punishment, including that of a reprimand, would be likely to be adverse to the advocate and solicitor as it would be a blot on his record and therefore, he ought

to be given a reasonable opportunity to be heard and this blot on his record may very well be an issue for eg, should he wish to be considered for public office. Although it is to be noted that art. 132(3)(c) of the Federal Constitution provides that public service shall not be taken to comprise the office of judge of the Federal Court, the Court of Appeal or a High Court, a record of misconduct may very well be taken into account by the Judicial Appointments Commission in considering any advocate and solicitor for judicial appointment.

(xiv) By analogy, an order for costs against a solicitor personally is not to be made unless he has been given an opportunity to be heard, see O. 59 r. 6(2) of the Rules of Court 2012 which is reproduced below:

> 6. Personal liability of solicitor for costs (O. 59 r. 6)
>
> (1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the court may make against any solicitor whom it considers to be responsible an order:
>
> (a) disallowing the costs as between the solicitor and his client; and
>
> (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
>
> (c) directing the solicitor personally to indemnify such other parties against cost payable to them.
>
> (2) *An order under this rule shall not be made against a solicitor unless he has been given a reasonable opportunity to appear before the court and show cause why the order should not be made*, except where any proceeding in court or in Chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made:
>
> (a) because of the failure of the solicitor to attend in person or by a proper representative; or
>
> (b) because of the failure of the solicitor to deliver any document for the use of the court which ought to have been delivered or to be prepared with any proper evidence or account or otherwise to proceed.
>
> (3) *Before making an order under this rule the court may, if it thinks fit, refer the matter to the Registrar for inquiry and report and direct to the solicitor in the first place to show cause before him.*
>
> (4) The court may, if it thinks fit, direct or authorise the Bar Council to attend and take part in any proceedings or inquiry under this rule, and may make such order as it thinks fit as to the payment of its costs.

(5) The court may direct that notice of any proceedings or order against a solicitor under this rule shall be given to his client in such manner as may be specified in the direction.

(6) Where in any proceedings before the Registrar; the solicitor representing any party is guilty of neglect or delay or puts any other party to any unnecessary expense in relation to those proceedings, the Registrar may direct the solicitor to pay costs personally to any of the parties to those proceedings.

(7) All references to "Registrar" in this rule when applied in the Subordinate Court shall be read as referring to a Judge of the Sessions Court or a Magistrate. (emphasis added)

(xv) If an order for costs in a civil proceeding is not to be made against an advocate and solicitor personally without giving him a reasonable opportunity to be heard, what more when the advocate and solicitor is likely to be meted a punishment in proceedings which is akin to a criminal trial.

(xvi) Finally but by no means the least, the Court of Appeal in *Ong Keh Keong v. Lembaga Tatatertib Peguam-peguam* [2020] 10 CLJ 181 was emphatic in holding that:

> [52] **Pursuant to s. 103D(4) of the LPA 1976, it was Parliament's intention that an advocate and solicitor be given the right to make a representation before the Disciplinary Board**. Such representation should have been taken into account before the procedure for punishment is finalised, and it is only at the end of this process that the Disciplinary Board must make a decision with respect to the nature of the punishment to be imposed. (emphasis added)

Conclusion

[58] I have no reason to interfere with the finding of liability of the DC which was affirmed by the DB but as the DB sought to impose a punishment or penalty upon the appellant, which would be an order that is likely to be adverse against the appellant, it should have notified him of its intention to do so and given him a reasonable opportunity to be heard.

[59] Wherefore, the order of punishment of the DB is set aside with the matter to be remitted back to the DB for the DB to give the appellant a reasonable opportunity to be heard before it makes an order that is likely to be adverse against the appellant and in the circumstances that obtained, I made no order for costs.